

**Notes from HB3113 / SB1403 Working Group Meeting
September 7, 2007**

Members of the stakeholder group were asked to introduce themselves and give a brief statement of what brought them to the table and what their hope or expectation of the process is.

Hopes/Expectations for this Process:

- Consensus on Board/DEQ roles
- Learn more and arrive at what is best for the citizens
- Work with all the stakeholders to create a workable solution
- Look at the issues through fresh eyes
- Have interests and concerns addressed across all sectors
- Make sure that citizen voices are heard
- This is a chance to improve things, to “get it right” (voiced by several participants)
- Want to set identifiable goals for environmental protection
- Make sure there is meaningful participation by the public (voiced by several participants)
- Consistency among Boards; procedural symmetry
- Increased opportunities for board membership
- The need for subject matter expertise on Boards Increase timeliness; reduce costs – find efficiencies without reducing citizen input or environmental protections (voiced by several participants)
- Increased predictability and certainty about the process used for making different decisions.
- Continual improvement – this is an opportunity to consider if current system can be improved

A brief introduction was given to the group regarding major issues identified in the legislation and in earlier meetings of stakeholders.

Issues/Concerns raised in legislation:

1. Boards

Current:

- a. Multi-media issues are now handled by multiple Boards
- b. Restrictions on membership track federal law (different for all three Boards)

Legislation:

- a. Boards would have no permitting authority and, therefore, no restrictions on membership
- b. Board members required to represent diversity of sectors and expertise

2. Permitting/Role of Boards/Consolidation

Current:

- a. Water: Board hears 12-14 cases per year and delegates the rest (approximately 300 cases/year); all enforcement issues are handled by the Board
- b. Air: Board has heard about three cases in the last 14 years and delegated the rest; all enforcement issues delegated to DEQ (one has been elevated recently)
- c. Waste: Board has no role in permitting. All enforcement issues in DEQ.
- d. Each medium has a different set of procedural steps and different levels of authority

Legislation:

- a. DEQ has all permitting and enforcement authority
- b. Step added for a public meeting before the Director in which the staff makes its recommendation and public responds prior to the decision being made
- c. Consolidation of Boards into one Board allows for consideration of multi-media issues;
- d. Consolidation of Boards means that there will be only one set of rules and procedures for public to know
- e. Consolidated Board, dealing with regulations only, opens the possibility for different types of members (i.e. farmers and other members of the regulated community, who are currently prohibited from serving on the Water Board)

3. Appeals Process

Current:

- a. All programs have rehearing process (de novo)
- b. VPDES and VPA permit holders have right to appeal; others can request
- c. Appeals before an Administrative Hearing Officer end with a recommendation by the Hearing Officer to the decision maker (Board or Director)
- d. In a rehearing by the Board, the Board is the ultimate decision maker

Legislation:

- a. Appeals are heard by an appeals board
- b. On appeal, the appeals board will only consider whether a clear error has been made
- c. Anyone with standing has the right to an appeal if he/she can demonstrate likely error was made

An unanswered question: Is exhaustion of administrative remedy required before taking a case to court? This was not addressed by the legislation.

4. Public Participation

Legislation:

- a. Doesn't change any public notice, public comment, or public hearing requirements
- b. Changes the role of the Boards in receiving public comment
- c. Increases access to appeals process for citizens with standing
- d. Increases transparency of process for Waste permits and, possibly, Air
- e. Allows access to decision maker prior to decisions in significant permits

Possible opportunities for public participation identified by the group:

- a. Pre-application
- b. Application filed
- c. Application deemed complete
- d. Draft permit issued
- e. Pre-decision
- f. Decision
- g. Appeal

There was significant discussion about how to make sure that public participation is meaningful and that it comes into the process early enough to have an impact on the outcome.

- Is there a way to bring the public into the process before a "controversial" permit is drafted?
- "Meaningful" participation is when the public can affect the outcome
- There is a desire for consistency, knowing how and when things will be handled.
- It is difficult to know what "controversial" or "significant" is in terms of public participation (numbers? Category of permit? Level of controversy?)

A great deal of discussion took place about the reasons for the legislation, with a number of people expressing some confusion about the rationale behind it. It was mentioned

several times that Virginia has been listed as the number one “business-friendly” state and as having a business-friendly regulatory environment.

In response, several offered the view that the legislation offers the opportunity to improve the system and rather than “fixing what’s broke” it’s about coming up with the process that makes the most sense and is the best.

A question was raised as to the history of the three separate boards, each with its own set of rules and its own authority:

- Boards were developed over time in different agencies
- No explicit rationale stated at the time for why there were different levels of authority when they were created
- Boards were formed independently of each other
- They were effectively “silos” in the same secretariat

As to why they were not consolidated at the time of the creation of DEQ, several people commented that it was in part an historical accident and, in part, a political reality. Given the huge changes being undertaken in creating DEQ, the General Assembly chose not to address the consolidation of the boards at the same time. Also, there were those who had concerns about the formation of DEQ and wanted to retain the three boards until they had more experience with a consolidated environmental agency.

A critical issue identified by the group as a place to begin was a discussion of whether the authority for permitting and enforcement should rest with the Board (as in Water and Air), with the ability to delegate to the Director, or should rest with the Director.

Many issues were discussed regarding this decision-making authority, including the fact that the director is an at-will employee of the Governor and that his/her position is in question at least every administration change. Boards, in contrast, are appointed to staggered terms and, therefore, represent the political (and environmental) leanings of more than one administration. Some also said that it is easier to hold a single decision-maker accountable for their decisions.

There was also discussion of the importance of having citizen boards involved in setting policy when regulations are adopted and whether or not the Boards could or should set policy when making case decisions (ie, issuing permits).

A number of possible models for dealing with the authority question were proposed. (The question of Board consolidation was seen as separate and was not addressed in this discussion; where the notes refer to a single board, it could also mean three boards). Key options/considerations were seen as :

1. Use the Water Board model across media (Board has authority over permits and delegates most of it).

2. Use the Waste Board model across media (Director has authority over permits).
3. Use the Water Board model across media, with some explicit requirements:
 - a. Staff needs to articulate clearly the reasons for its recommendations to the Board on a permit application or enforcement action
 - b. The Office of the Attorney General needs to articulate clearly whether the action recommended by staff fits within the regulations (is "legal")
 - c. The Board needs to articulate clearly the reasons for its decision, particularly if it chooses not to adopt the recommendation of staff
4. Create a model in which the Director has authority to decide cases, with the exception of a few which could/would be elevated based upon clearly delineated parameters in statute or regulation; the parameters were not discussed.
5. Create a model in which the Director has authority to decide 100% of the cases and there is a right of appeal or re-hearing before the Board(s); unanswered questions in this model include:
 - a. Who would have standing to appeal
 - b. What would be the grounds for an appeal
 - c. What would be the parameters of the appeal/rehearing process
 - d. How would timeliness and finality be assured
6. Retain the status quo with different models for the three program areas.

Following these discussions, members of the public in attendance at the meeting were invited to speak.

1. The question of the impetus behind the legislation and the problem being addressed by the legislation was raised.
2. It was noted that permitting is technical/legal and citizen boards are required to apply law (regulations) to fact (applications), which is a huge burden. It was suggested that the function of applying the regulations should be left to the technical experts, rather than left in the hands of policy boards.

There was a request that the patrons of the legislation come to address a future meeting of the Working Group. It was noted that several former directors of DEQ (in addition to those already engaged in this process) would come to offer their perspective.

Participants were asked to contemplate the following in preparation for the meeting on October 1:

1. Identification of the parameters and criteria they would like considered for determining what constitutes a "significant permit"
2. Consideration of what criteria should be used for who has access to an administrative appeal or rehearing
3. The scope of the review allowed for any appeal or rehearing
4. Board member qualifications or membership restrictions